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of

RECENT DECISIONS

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TABLE OF CONTENTS

ARTICLES

Statutory Aspects of Double Jeopardy.....37

Courts-Martial as compared with Civil Courts.....45

RECENT DECISIONS

Let's Go Whole Hog.....51

The Motion Picture in the Court Room.....56

NOTES

Are Municipal Corporations under §289 C.P.A.?.....59

Strict Interpretation of Inferior Court Jurisdiction....61

Conviction of Previous Offense by Court-Martial.....62

Are Attorneys' Fees "Expenses" under P.P.L.§78?.....62

Parness v. Halpern, 257 A.D.678.....64

"People on Complaint of Rossiter v. Rossiter."....67

Extradition.....69

Liability of State for Torts of its "Officers and Employees"...70

STATUTORY ASPECTS OF DOUBLE JEOPARDY

Almost in the "catchword" category of elementary civics, the term "double jeopardy" is a well known one. Originally a common law concept, the principle of double jeopardy was inculcated into both our Federal and State Constitutions (5th Amendment, U.S. Constitution; Article I §6 N.Y.State Constitution). Nearly everyone has heard of it. But despite its being so widely known, this principle has often been misinterpreted.

Starting with the maxim that a man can be tried but once for a crime, it seems but simple formulation to state that once a man is either acquitted or convicted of a particular crime he is forevermore immune from further prosecution therefor. But this simple concept of "autrefois acquit, autrefois convict" is merely the initial step in any analytical survey of the true problem of "jeopardy".

It is in the interpretation of that last word that difficulties present themselves. The Constitution forbids not only a recurrence of a second trial but also that of a second jeopardy. Hence, once jeopardy has attached to person, the prosecution can take no backward step against him in the proceedings.

In endeavoring to determine when jeopardy has attached it is perhaps necessary to stress a few fundamentals. Almost over-simply, jeopardy begins when the trial has started -in the instance of a trial without a jury, when the testimony has commenced before a magistrate having jurisdiction; in that of a trial jury, when the jury is impaneled before a competent court and all is ready to begin. As soon as either point is reached the accused is placed in jeopardy. Thenceforward he is "in peril" within the Constitutional definition. Therefore, if at any time thereafter, the trial is stopped without the consent of the accused (for the rights under the double jeopardy clause may be waived; People v. Palmer, 109 N.Y. 413.) then the accused cannot be tried again for that offense.

As most general (and comforting) statements are invariably subject to exception, so also is the above. There are circumstances that justify the interruption or discontinuance of any trial without incurring the stigma of a former jeopardy. The Code of Criminal Procedure provides: "After the jury have retired to consider their verdict, they can be discharged before they shall have agreed thereon only in the following cases:

1. Upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together; or

2. When after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or

3. When with the leave of the Court, the public prosecutor and the counsel for the defendant consent to such discharge."

Code Crim. Proc. §428.

Although the Code specifies that the above are applicable "after the jury have retired", there are necessarily instances where prior to that time the Court may in its discretion declare the trial to be at an end. These instances exist as excuses to terminate the proceedings because by their very nature they prevent anything but a farce from continuing. These include the death of a juror or the defendant; some sudden visitation that incapacitates the defendant from defending himself or being present at the trial; the death or illness of the judge; disqualification of a juror; expiration of the term of court while trial is in progress; absence of defendant at his own voluntary act. (People v. Goodwin, 18 Johns. 187; Code of Cr. Proc. §430).

These exceptions to the general rule owe their existence to necessity. To have an ironclad, inflexible rule that would allow nothing to terminate the trial until submission to the jury would be, to use a colloquialism, in effect "hog-tieing the blindfolded goddess." In the sensible and ordinary course of affairs, allowance must be made for sudden external disruptions. To hold otherwise would be to blink the natural order.

The text-writers have argued that the above is based on the theory that although the defendant was in apparent jeopardy, yet due to the future happening he never was really imperiled. (Bishop, Vol. 1 §1031). But perhaps the more realistic theory is that any defendant must realize that it is not impossible that some exigency will arise and of necessity make impossible the rendering of anything but a farcical decision. Should such arise, the defendant can anticipate the termination of the trial and the erasure of any existing jeopardy.

Notwithstanding the above stated exceptions to the general rule it still remains the law that once the trial has started the jeopardy becomes complete and the trial cannot be terminated.

It is not in the mere statement of rules of law that jurisprudence displays itself. Rather is it in their application to specific instances. The first part of this article merely states abstract legal principles. To indulge in the specific is the true province of legal analysis. So let us devote the remainder of the article to applying the foregoing legal truths to a particular problem.

On the statute books of New York there is cited a certain section which reads as follows: "If it appears by the testimony that the facts proved constitute a crime of a higher nature than that charged in the indictment, the court may direct the jury to be discharged, and all proceedings on the indictment to be suspended, and may order the defendant to be committed, or continued on or admitted to bail, to answer any new indictment which may be found against him for the higher offense." Code Cr. Proc. § 400. This statute, which authorizes a superceding indictment, invites scrutiny. Plainly it is to be brought into play after the trial has begun. The very words "if it appears by the testimony" can have no other meaning. It states that the judge may halt the proceedings after jeopardy has been incurred. What else, under the guise of reasonable interpretation, could it mean? Therefore, we are brought face to face with a

legislative enactment which not only involves the constitutional prohibition but also, in the light of established legal doctrine, plainly contradicts it. This is not the case of the defendant being in so-called "apparent jeopardy." This is not the case of some external event which by its very nature prevents a culmination of jeopardy. The mere existence in the facts of a higher degree of the crime charged does not prevent the defendant from being convicted or acquitted validly of the crime as charged.

It is inherent in the law of jeopardy that once a man is placed in jeopardy for a crime he cannot again be jeopardized for any degree of that crime, be it higher or lower. (Code Cr. Proc. §§444, 445.) Thus it devolves upon the prosecution to choose which degree shall be the issue of the trial. This follows from the statutory declaration that: "Where a person is acquitted or convicted, upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime, in any other degree (underlining, mine) nor for any attempt to commit the crime so charged, or any degree thereof." (Penal Law §32) From this it appears that in a prosecution for a crime it is incumbent on the district attorney to choose which degree of the crime he shall prosecute and that in choosing he does so at his peril. As has been stated quite succinctly, "The rule is well settled in criminal practice which allows the prosecution to carve as large an offense out of a single transaction as he can, yet he must cut only once." (White, P.J., Simco v. State, 9 Tex. App. 349). Thus if a prosecuting officer, in a homicide proceeding, decides merely to prosecute assault first degree, he may do so and despite the facts existing to substantiate a first degree mruder charge, the jury can and must find the defendant guilty or not of first degree assault or any lower degree thereof. (I am not unmindful of §260 of the Penal Law which seems to be a sort of twin of §400 of the Code). "A person may be convicted of an attempt to commit a crime although it appears on the trial that the crime was consummated unless the court in its discretion discharges the jury and directs the defendant to be tried for the crime itself." Penal L.§260. The first clause of the above section is merely reiteration of the common law and as regards the latter clause, I consider that the same arguments as apply to §400 are applicable to §260 of the Penal Law. If all the above is legally correct, and I believe that the decisions interpreting the jeopardy clause of the Constitution so establish, then it follows that §400 of the Code of Criminal Procedure is unconstitutional

All this discussion of jeopardy and its meaning, culminating in the conclusion that a certain statute is repugnant to the Constitution, is interesting from an analytical point of view. Yet, as regards this particular statute of ours, there is another interesting phase which indirectly appertains to our former discussion.

Despite the existence of this statute on the books for a period of over eighty years, there is a dearth of adjudications; even of those which only incidentally involve it. People v. Goldfarb, 152 A.D.870, af'd 213 N.Y.664, is perhaps remarkable due to the fact that although it was decided while the statute was in force, the decision does not mention it, and even contradicts it. Even so it is significant in that it decides the issue on general constitutional grounds. In the Goldfarb case, the defendant, charged with disorderly conduct, was arraigned on that charge. He employed counsel and entered upon the trial. The magistrate, after hearing part of the

evidence,
decided that although he had jurisdiction of the crime as charged, he could not give as severe a sentence as could be given to defendant if he had been charged with a violation of a different section of the Penal Law. Thereupon the magistrate decided that a new complaint be made out and that the defendant be discharged on the old and re-charged on the new. The defendant pleaded former jeopardy in answer to the new charge. The Court held that although the magistrate had no intention of acquitting the defendant, he had in legal effect done so; and under the principles of constitutional interpretation the plea of former jeopardy was good.

Undoubtedly this case states the proper rule. Yet notice, that at no time during this appeal was §400 ever mentioned. In other words the prosecution in endeavoring to sustain the conviction did not attempt to make use of that statutory aid.

In People ex rel. Bulloch v. Warden City Prison, 87 Misc. 595 the Supreme Court held that §400 might be constitutional but that even so the judge could not wait until defendant had been put to his defense before recommitting the defendant. This dicta was overruled in the appeal of that case, People ex rel Bulloch v. Hayes, 166 A.D. 507, in that the case contained the feature of the jury being unable to agree and thus the defendant had never been in jeopardy at all. The court specifically said, "We have not considered the effect of §400 of the Code of Criminal Procedure, nor whether such legislation violates constitutional restrictions, for the reason that this case is not included within its provisions." (page 513).

The latest case which I have been able to find mentioning §400 of the Code is People v. Fagan, 163 Misc. 495. There the defendant claimed that the crime of assault second degree is merged in higher crime of rape so that the indictment for the lower crime should be dismissed. The court in denying defendant's contention cites §400 of the Code, and §260 of the Penal Law, and states that those sections show that merger is not automatic; that a man can be tried for the lower degree of the crime or not.

These cases are typical of those in which §400 is mentioned. As far as I can discover the section has never been squarely presented to the Court for a construction as to its unconstitutionality. The above cases allude to that section but never really use it except as dictum to bolster up an argument. Hence the determination that the statute is unconstitutional does not fly in the face of any precedent.

Although the New York courts have not passed directly on the statute under discussion, the courts of other states have performed that office substantially. In People v. Hunckeler, 48 Cal. 331, the defendant was indicted for murder. He pleaded former jeopardy in that he had previously been tried for manslaughter. After the testimony in the manslaughter trial, the Court without the consent of the defendant, dismissed the jury and remanded the defendant to the custoday of the sheriff so that an indictment might be found for a higher crime. Section 1112 of the Penal Code of California was the authority for the Court's decision. That section, strangely enough, reads identically with §400 of our New York Code of Criminal Procedure. The Appellate Court held that the California constitutional provision with reference to double jeopardy protected the defendant.

"A defendant is placed in apparent jeopardy when he is placed on trial before a competent court and a jury impaneled and sworn. His jeopardy is real unless it shall subsequently appear that a verdict could never have been rendered by reason of the death or illness of judge or juryman or that, after due deliberation, the jury could not agree, or by reason of some other like overruling necessity which compels their discharge without consent of defendant. And when a person has been placed in actual jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject." (Underlining, mine). People v. Hunckeler, supra. In my opinion the Court of Appeals of New York would cite this case with unanimous approval should our statute be brought before it.

But before considering foreign adjudications and their possible persuasive power on courts of this jurisdiction, investigation of the rule as to jepoardy in other states is in order. At the beginning of this article, is stated what appears to be the correct rule in New York State. But that rule is by no means accepted in every state. A confluct of theory is in evidence when out-of-State constitutions, statutes and adjudications are examined. This conflict has been explained on the ground that there was no such a plea as "former jeopardy" known as such to the common law although mention of it is found in several common law cases and texts. (Introductory note. American Law Institute's Proposed Formal Draft of Administration of Criminal Law.) This explanation holds that the framers of the Constitution of the various States had in mind the common law meaning of after-conviction or acquittal when they drew the so-called "double jeopardy" clauses. But that the courts have broadened this original meaning into the concept of jeopardy attaching when the trial begins. Their proposed draft follows the principle that only on acquittal or conviction - not jeopordy of conviction or punishment - is there a bar to a second prosecution for the same offense. This principle has been the law of several jurisdictions due to the peculiar constitutional provisions there existent. Thus §22 of the Constitution of Mississippi requires "actual acquittal or conviction on the merits to bar another prosecution." Roberts v. State, 72 Miss. 728, holds that to be the proper and only construction of §22. But it is interesting to note that the previous law in Mississippi was distinctly otherwise. See Helm v. State, 66 Miss 537. No doubt the Constitutional Convention had this in mind when §22 was promulgated.

The case of State v. Bucnte, 165 S.W.340, informs us that the Constitution of Missouri requires actual acquittal or conviction to constitute jeopardy, so that §4902 of the Revised Statutes of 1909 (somewhat similar to §400 of the Code of Criminal Procedure of New York) is constitutional.

Among the other States which have similar provisions, are Iowa, Michigan, and Oklahoma. The variety in the wording of the several States increases with each examination but its significance is apparent without further reiteration. Our use of the adjudications of other states must of necessity be limited by the precaution of determining the exact constitutional provision controlling the case.

People v. Hunckler, supra, is logically helpful to our specific inquiry since the California Constitution (1879, Art.I §13) is the same as the New York provision.

Fairly representative of the pertinent out-of-state cases are the following, from which brief quotations are enlightening and persuasive:

Holt v. State, 38 Georgia 187 - The court said, "If the State thinks proper, by its prosecuting officer, to indict a party for an assault with intent to murder, upon a given state of facts, and upon the trial thereof, the defendant is acquited can the State then proffer another indictment alleging precisely the same state of facts (with the exception of the malicious intent) and put the party again upon his trial for the same criminal acts by altering the name of the offense? The State having made its election as to the nature and character of the offense for which it will prosecute the party on a given state of facts, if upon the trial, the defendant is acquitted, ought not the State to be bound by its election, and not to be permitted to indict and prosecute the defendant for the same criminal acts, under the name of another offense?"

Ingram v. State, 124 Georgia 448 - The defendant was put on trial in city court for adultery. On the trial, the court decided, after hearing the district attorney's evidence, that a felony had been committed. He suspended the trial and withdrew the case from the jury. On the later prosecution for the felony, the defendant pleaded former jeopardy. The Court held that where a criminal case had been submitted to the jury on a valid indictment and is withdrawn from their consideration by the judge for any reason other than consent or necessity in some of its various forms, one of which is mistrial, it is equivalent to an acquittal of the accused. The court cited Holt v. State, supra, with approval and declared §27 of the City Court Act, which section authorized the judge's action, unconstitutional. Other cases in Georgia uphold this rule. Bell v State, 103 Georgia 397; Griffin v. State, 113 S.E.66.

State v. Wiles, 26 Minn.381 - Here it was held that a former conviction or acquittal of a minor offense is a bar to a prosecutio for the same act, charged as a higher crime, whenever the defendant on the trial of the latter, might legally be convicted of the forme had there been no other prosecution.

State v. Yokum, 155 La. 846, 99 So. 621 - The Defendant was charged in one bill with the offense of unlawfully manufacturing intoxicating liquor for beverage purposes. In another bill she was charged with unlawful possession of intoxicating liquor for the sam purposes. A statute of Louisiana said "If upon the trial it shall appear that facts given in evidence amount in law to some other offense, defendant is not to be acquitted and no person tried for suc a crime shall be liable to be afterward prosecuted for such other o fense on the same facts, unless the Court before which such trial may be had shall think fit in its discretion to discharge the jury from giving a verdict on such trial and to direct such person to be indicted for the offense shown to have been committed." The defend ant here said that he could not be tried for the second offense because the judge did not discharge the jury in the first trial. The Court held that the heart of the statute relied on was in the power of the judge to discharge the jury. That could not be constitution ally done. Hence the stature was unconstitutional.

People v. Ng. Sam Chung, 94 Cal. 304, 29 Pac. 642 - On the trial of a defendant in police court for the offense of petit larceny, the evidence showed the offense really was grand larceny. The court dismissed the case. Thereafter the defendant was charged in Superior Court and convicted of grand larceny. The Appellate Court held that a conviction or acquittal of a higher offense is a conviction or acquittal of all lesser offenses necessarily included therein. Here the defendant was charged with grand larceny in stealing a bracelet. This offense necessarily included petit larceny. Here under the indictment filed the defendant could have been convicted of petit larceny if the facts showed that the bracelet had not been taken from the person of the victim. Therefore, jeopardy had attached in police court.

These cases show generally what the high courts of other states with constitutional provisions similar to those of New York have to say about the question of superseding indictments. Any contrary adjudications in such states are usually explainable either on the failure of the court to distinguish between statutes allowing nolle prosse before the trial begins and those referring to after the trial has begun, or on an erroneous conception of jeopardy

As regards the latter, Davis v. State, 39 Tex. Cr. R. 681, is a good example - identical with Ingram v. State, supra, in that it involved a dismissal of a trial for adultery because the evidence showed that a felony had been committed. The court held just the opposite on the question of jeopardy, saying that §590 of the Texas Code of Criminal Procedure authorized the superseding indictment. That section was held constitutional because no question of jeopardy was involved! This amazing result was reached by the logic that since the court of the first instance was a court of limited jurisdiction and had no jurisdiction of the felony, the jeopardy did not attach. To the same effect are Larson v. State, 140 N. W. 186 (Nebraska); Crowley v. State, 113 N.E. 658 (Ohio); Hoffman v. State, 84 Misc. 479; Reddy v. Comm., 97 Ky 784; Comm v. McCan, 178 N.E. 633, (Mass.); State v. Pearson, 49 R.I. 396; Harris v. State, 160 Tenn. 396; Richardson v. State, 109 Tex. Cr. 403.

The validity in legal logic of these arguments eludes the writer. The prime requisite of jeopardy is admittedly jurisdiction but jurisdiction of the offense as charged. The above courts are correct in saying that the lower court had no jurisdiction of the higher offense, but the lower court had jurisdiction of the lower offense and that was the crime as charged.

In conclusion our review might be summarized in a brief statement. In those states where the constitutional provision requires actual acquittal or conviction on the merits, we cannot quarrel with the decisions nor can we take them as authority in New York. But in those states whose constitutional provisions contain the ordinary blanket protection from double jeopardy, it must be urged that jeopardy attaches when the trial begins before a competent court. That is the current of authority and must be deemed the proper rule. If that is so, then statutes that allow the judge to stop the trial without the consent of the accused and in the absence of legal necessity are unconstitutional. This means that §400 of the

Code of Criminal Procedure is within the prohibitory realm. The law is and should be recognized to be as stated in 16 Corpus Juris 253 (Criminal Law §407(11)): "Where on the trial the court without consent of the accused, discharges the jury because it is of the opinion that the evidence shows him guilty of a higher crime, for which crime he is subsequently indicted, he is twice in jeopardy and should be acquitted."

WILFORD ARNOLD LeFORESTIER

COURTS-MARTIAL AS COMPARED WITH CIVIL COURTS

The modern court-martial is the evolution of the medieval court of chivalry. This fore-runner, however, exercised an extended jurisdiction unknown to the modern courts and to such an extent that its encroachment upon the other courts of common law was restrained and curtailed by Parliament. The first Mutiny Act of 1689, however, restored some of the power of these courts by empowering the sovereign to grant commissions to convene Courts-Martial. Their jurisdiction and powers, developed in subsequent Mutiny Acts and Articles of War have finally been established and defined in the most recent revision of the Articles of War.

In order to make a comparison between courts-martial and civil courts, an outline of the procedure, jurisdiction, and other details of the courts-martial is necessary. The jurisdiction of courts-martial is entirely criminal. They take no cognizance of civil actions which are thereby properly relegated to the civil courts. The sources of military law are the Constitution of the United States, the enactments of Congress, Army regulations and orders and the unwritten military law. The "statutory" law is derived from the Articles of War enacted and revised from time to time, by Congress under the power specifically delegated to it by the Constitution. This power is entirely separate and distinct from the Judiciary Powers.

Under the present Articles of War - 1928 - there are three kinds of court-martial - general, special, and summary. A general court-martial consists of not less than five officers and has power to try anyone in the Army or any civilian who might become subject to its jurisdiction by virtue of the imposition of martial law in time of war or emergency. The general court is limited in the extent of the punishments it can impose only by the executive orders which are changed from time to time. These punishments range all the way from forfeiture of one day's pay, to death - for murder, rape, etc.

The special court is composed of not less than three members. It has jurisdiction of enlisted men only and can try any offense, not capital, made punishable by the Articles of War. The maximum punishment it may impose is confinement at hard labor not exceeding six months, and a forfeiture of not more than two-thirds pay per month for a like period.

The summary court is roughly comparable to a justice of the peace. It is composed of only one officer and has jurisdiction of enlisted men up to the rank of technical sergeant. It may not try a non-commissioned officer who objects thereto, without the authority of an officer competent to bring him to trial before a general court-martial. The summary court may not adjudge confinement at hard labor in excess of one month, nor "restrictions to limits" in excess of three months, nor forfeiture in excess of two-thirds of one month's pay.

In connection with this consideration of jurisdiction, one very interesting comparison to civil courts is discovered. Whereas

the jurisdiction of civil courts is limited by the nature of the persons, territory, and the action involved, courts-martial are limited only as to rank, and the nature of the crime and its punishment. There is absolutely no question as to territorial jurisdiction. For example, theoretically a soldier committing a crime in Hawaii may be apprehended in Panama and tried in Maine without any irregularity.

The "legal Bible" for the guidance and government of all court-martial procedure and matters related thereto, is the Manual for Courts-Martial, prepared by the Judge-Advocate-General's Department and published by the direction of the President. This little book, cited as M.C.M., consists of only 341 pages and is a marvel of comprehensive information. It is a form-book, manual of practice, compendium of statute law, and treatise on Evidence, rolled into one. Every commissioned officer in the service is required to have a working knowledge of this manual.

As stated by the A. W. and expanded and explained by the M.C.M. every action is started by a charge similar to the civil indictment. It consists of two parts: the "charge", which designates the alleged crime or offense as a violation of a particular A. W., and the "specification" which sets forth the facts constituting the same. Any number of charges may be preferred at the same time and there may be any number of specifications to each charge. Charges may be preferred by any person subject to military law. An enlisted man may prefer charges against his superior officer. The usual practice is for an officer to prefer charges. No one can be compelled to prefer charges. The charges must be sworn to by the person preferring them, before some person authorized to administer oaths for military purposes. For example, a sufficient charge for desertion would be as follows:

> Charge: Violation of the 58th A. W.
> Specification: In that Private John Smith, Company "A", 9th Infantry, did, at Fort Sam Houston, Texas, on or about the first day of April, 19__, desert the service of the United States and did remain absent in desertion until he was apprehended in Dallas, Texas, on or about the 10th day of November, 19__.

The charge would also include all necessary data concerning Private Smith such as date of enlistment, rate of pay, etc. Also included are the names and addresses of the witness against the accused.

It is not necessary to prefer charges before arrest or confinement, but once arrest or confinement is ordered, charges must be preferred within twenty-four hours. No unnecessary delay of any sort in the prosecution of a case is tolerated. A.W.70.

The charges are then forwarded to the regimental commander whose duty it is to have the charges investigated, either personally or by an officer appointed by him. This "Investigating Officer" then conducts a hearing which is in the presence of the accused. The hearing consists of examination of the witnesses against the accused, who has the right to cross-examine at this time. The ac-

cused may also make a statement or introduce witnesses, but usually remains quiet. The officer then forwards the signed statements of all witnesses with a recommendation as to the disposition to be made of the charges, to the commander. If the "Investigating Officer" is of the opinion the charges can be sustained, he also recommends the type of court for trying the case, in order that the proper punishment may be imposed. If the "Investigating Officer" believes that the charges cannot be sustained he will recommend that they be dropped.

The regimental commander can then make his decision as to the disposition of the case. If he decides it should be tried, he has the power to appoint a summary or special court. If the severity of the crime requires punishment which only a general court can impose, he forwards the report to the division commander recommending trial by general court-martial. Before any general court-martial is ordered the reports are gone over by the office of the Division Staff Judge-Advocate. If found sufficient by them, they are forwarded to the Trial Judge-Advocate of a general court-martial by order of the division commander.

The Trial Judge-Advocate corresponds to the district attorney. It is his duty to prepare and try the case. After five days' notice to the defense council, also appointed in the order appointing the court-martial, the case can be tried whenever both parties are ready.

When both parties are ready the court is notified and it convenes. The senior officer present is the president. Both counsel then have the right to examine the court to determine whether any bias, favor, etc., exist which would influence the decision. The grounds for challenge are very similar to the grounds for challenging a juror in a civil court, including one very interesting one - that the member of the court challenged will be promoted by the dismissal of the accused. If the challenged member admits the fact he is challenged on, he may be excused. If he denies it, evidence may be introduced by both sides. The court then withdraws and votes, without the challenged member, on whether the challenge should be allowed. A majority is sufficient. Each party is also allowed one peremptory challenge. When all the challenges have been disposed of, the remaining members constitute the court. They are sworn in by the Trial Judge-Advocate and then the senior officer, president of the court, administers the oath to the Trial Judge-Advocate.

The accused is then arraigned very similarly to the procedure in a civil court. Pleas and motions may then be made by the accused. The action of the court on these special pleas is not final but is subject to review by the "reviewing authority", that is, the officer who appointed the court. He may approve or disapprove and return the case for further consideration by the court.

The 1920 version of the code first provided for the law-member of a general court-martial. The primary object was to have some officer on the court, who by reason of his training and experience, was competent to rule intelligently on questions affecting the admissibility of evidence and to make his rulings binding upon the other members.

The duties of the law member consist in ruling on all interlocutory questions other than challenges arising during the proceedings. The law member cannot so rule on the findings nor the sentences, of course, but subject to these exceptions, his rulings are the rulings of the court. The law member has an equal vote with other members on any questions which are to be voted on by the court. He may, like any other member of the court, put questions to the witnesses which appear necessary or desirable to elucidate the truth. M.C.M. 1921 #89a; A.W.31.

After all the evideince is in, the court is closed and the members vote on the findings. This is done by secret written ballo each member, including the president and the law member, having an equal vote. The vote as to the guilt or innocence of the accused is by first voting separately on each specification of a charge and then voting on the charge. A two-thirds vote is necessary to sustain a conviction, except where a death sentence is mandatory. In such a case there must be an unanimous vote of all the members. This vote "on the findings" differs from other votes which only require a majority (although a tie vote is considered a vote in the negative).

After the vote on the findings, the court is re-opened and the result announced. If the accused is found guilty, his service record and record of previous convictions are then first made known to the court. The court then closes again to vote on the sentence.

A record of trial must be kept of each case tried by a general or special court-martial. This record and the findings and sentenc of the court are then forwarded to the appointing officer, now known as the reviewing authority. He submits the record to his staff judge-advocate who carefully reads the record and usually writes an opinion on it.

The next step is then by the reviewing officer. He must act in person. His authority here cannot be delegated. Until he has taken some action, the findings and the sentence of the court are without effect. He is allowed wide latitude - he may do anything from ordering a new trial (except in case of acquittal) to approving the entire record or any part thereof.

If the sentence involves death, dismissal, dishonorable discharge or confinement in a penitentiary, the proceedings must be approved by the Board of Review and the Judge-Advocate-General, and if such a sentence is adjudged against an officer, it must be approved by the President. A.W.50½ provides for approval of the record of trial by the Board of Review and the Judge-Advocate-General of every court-martial. No action on the findings or sentence can be taken before this automatic appeal is finished. These boards have the same power as to the findings and sentence as the "reviewing authority" had.

The Board of Review consists of not less than three members of the Judge-Advocate-General's Department. Their prime objective is to determine if the record is legally sufficient and to ferret out errors of law or evidence committed on the trial. By A.W. 37 such errors shall render a proceeding invalid only where "it shall appear that the error complained of has injuriously affected the substaintial rights of accused."

Upon the approval of the record by the Board of Review, it is forwarded with the recommendations of the Board of Review to the Judge-Advocate-General, who also reviews and passes on the findings. If he approves, he sends notice thereof to the reviewing authority who publishes a general court-martial order embodying the sentence.

As a general rule, the proceedings in court-martial are not subject to judicial review by the civil courts. In Smith v. Whitney 116 U.S.167, the court said, "The acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise." The rule was reiterated and clarified by the court in Runkle v.U.S., 122 U.S. 543, "to give effect to its sentences it must appear affirmatively and unequivocally that the court (court-martial) was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been compiled with, and that its sentence was conformable to law."

With this as a background we may now turn to the comparison between the court-martial and civil criminal procedure. The most abl dissertation I could discover on the subject was contained in an address by Major-General Blanton Winship, Judge-Advocate-General of the United States Army, delivered before the Federal Bar Association in October, 1931. A report of the speech is contained in the Federal Bar Association Journal for March, 1932.

General Blanton took as the basis for his comparison, a speech by Mr. Justice Owen J. Roberts of the Supreme Court of the United States, which suggested a number of evils existing in the procedure before the criminal courts and pointed out changes that would improve it.

The first criticism is of the grand jury. An accused individua is never present at these hearings and, as a rule, can neither testify nor summon witnesses to testify for him. This evil is eliminated under the system of court-martial. Both prosecution and defense are heard before the accused is ever brought to trial, and the accused in a court-martial comes to trial only after an impartial investigation has made it reasonably clear that an offense warranting trial has been committed. The court-martial procedure has progressed far beyond the ex parte inquiries and similar proceedings where the accused is allowed no opportunity to defend himself.

The next problem is that created by the requirement for unanimous verdicts of the jury in criminal cases. Hung juries are said to be one of the worst troubles in American criminal cases. Under the A.W. a hung jury is impossible. An unanimous verdict is only required in capital cases. Sentences carrying ten years or more confinement require three-quarters verdict, and all others, two-third If the necessary proportion fails to agree upon a conviction, the result is an acquittal.

The third and most conclusive advantage of the court-martial over the civil courts is in relation to appeals. No accused soldier is deprived of his rights and freedom for failure to make proper exceptions on his trial, nor for failure or inability (such as financial) to appeal, nor for appeal on the wrong points. Every Court-Martial is subject to at least two automatic appeals. The appointing officer of the court-martial, as "reviewing authority", with

the aid of his legal staff, reviews the law and facts of every trial. If he approves of the findings and discovers no substantial error, the report is then reviewed again for questions of law by the Board of Review and the Judge-Advocate-General. In these reviews or appeals the authorities are governed by two cardinal rules to safeguard the rights of all concerned. The first is that which is mentioned above - that a new trial is ordered or a reversal granted only when the error committed on the trial was substantial or materially injurious to the rights of the accused. The other rule is a broad application of the rule recently reiterated by the Supreme Court that it is the duty of the courts to be watchful for the constitutional rights of citizens and against any stealthy encroachments thereon.

Under civil procedure, when the accused appeals, he may be released on bail by getting a supersedeas from the appellate court. Even though properly convicted, he may be free to roam and do as he pleases for the couple of years it takes to complete the appeal. After a court-martial finds the accused guilty, he is immediately confined until his case is disposed of. There is no delay in handling his appeal. Appeal in court-martial cases is both automatic and speedy. It is safe to say that the average case is finally disposed of within sixty to ninety days from the time the offense is committed and this time includes the automatic appeal to the Board of Review and the Judge-Advocate-General and the action of the Secretary of War or the President as the case may be.

Although we may not all agree with these criticisms and the claims advanced by the proponents of the military system, there is much food for thought here that legislators as well as lawyers might consider.

HARVEY MERVIN LIFSET

Comparison of Civil and Court-Martial Procedure - Howard Clark, 2nd Ind.L.J. 4: 589-99 Je.'29.

Military Court-Martial Procedure under the Revised Articles of War. Frank E. Taylor - Va.L.R. 12: 463-94. Ap.'26.

Judicial Review of Court-Martial - H.S.Covington. George Washington L.R.7: 503-13 F. '39.

M.C.M. 1928 and later editions.

LET'S GO WHOLE HOG

The recently decided case of Eisenbach v. Gimbel Bros.,Inc., 281 N.Y.474, marks, to my way of thinking, a healthy trend in the so-called trichinosis cases. Prior to this case the procedure in such cases has not been unlike the handling of the proverbial hot potato in that the moment a retailer was sued he immediately turned against his wholesaler who in turn passed it on to the packer who usually became burned. Why the packer didn't go after the farmer or the pig itself is probably more of a practical than a legal impossibility. However, in the Eisenbach case the brakes were applied to a limited extent and it is my contention that they might be well kept on, even in cases which are not on all-fours with Eisenbach v. Gimbel Bros.

In the Eisenbach case the plaintiff entered the restaurant of the defendant, ordered, ate, and became ill as a result of trichinae contained in the piece of pork tenderloin which he was served. In a suit against Gimbel Bros. for breach of warranty of fitness for human consumption Gimbels impleaded their vendor Chas. Wissmann Co., Inc., a wholesaler, and Wissmann in turn impleaded its vendor, John J. Felin & Co., a packer. The jury brought in a verdict for the plaintiff against Gimbel Bros. alone. The trial judge thereupon repeated his charge that if they, the jury, find for the plaintiff there should be the same verdict all the way down the line - that is, Gimbell against Wissmann, and Wissman against Felin. The judge had charged that "of course if the pork tenderloin was cooked so that all of it reached a temperature of at least 137 degrees Fahrenheit it is conceded by everybody that the pork did not have any live trichinae left in it. So if you believe the chef's testimony that he cooked this pork for two or more hours in boiling water and if you believe that if pork is cooked even an hour in boiling water the temperature reaches 137 degrees Fahrenheit even in the center then you have a right to conclude that there were no trichinae alive in this pork even if they were there to start with and that the plaintiff could not have gotten his trichinosis from this particular piece of pork tenderloin."

The Court of Appeals upheld the verdict against Gimbels but said that in view of the instructions given the jury the verdict for the plaintiff given against Gimbel Bros. must be taken as a finding that Gimbels did not adequately discharge its undertaking to properly cook the pork it served the plaintiff and that the actions-over should not be allowed. Their reasoning was to the effect that the trial court's charge concerning actions over was no doubt based on the case of McSpedon v. Kunz, 271 N.Y.131, but that the case at bar differed from that case in that in the McSpedon case the plaintiff housewife testified that she knew nothing about the requisite heat nor about trichinosis, whereas Gimbel's chef after twenty-five years or more of experience, did know. The court went on to say in the case at bar that this plaintiff had a case only in the event that the pork tenderloin had not been cooked as Gimbel Bros. concededly knew it ought to have been cooked; this is so in that if it had been properly cooked, the disease could not have resulted. But that in that event Gimbels had no case against Wissmann and so Wissmann would have no case against Felin. The court

held this to be true as Wissmann was entitled to invoke against Gimbels the principle that a party cannot recover for a loss that he could have averted by the exercise of due care under the rule laid down in the case of Fredendall v. Abraham & Strauss,Inc., 279 N.Y. 146. In the Fredendall case the plaintiff sought to recover on an implied warranty of merchantability for illness resulting from fumes from a cleaning fluid which she purchased from defendants. The evidence clearly pointed out that her illness was a result of failure to follow directions printed on the can and hence she was refused a recovery due to her failure to use reasonable care in the use of the fluid, this default being an essential cause of her illness.

The court in using this case lays down a rule which I believe prevents any restaurant from having actions-over in trichinosis cases. This can certainly be taken as a generalization, for if the chef can be shown to have known how the pork should have been cooked the case falls directly under the Eisenbach case, and if not, it would seem that the wholesaler might invoke the doctrine of the restaurant's negligence in hiring such an incompetent cook. In the Fredendall case the plaintiff made no claim that she didn't read the directions on the can of cleaning fluid, but I feel this would not have changed the result as the point is that she should have read them. I am in sympathy with such a result but further think it might well be held that a housewife is equally barred from actions against the retailer on similar principles, with the consequent elimination of all actions-over.

Before discussing the merits of such an extension of the Eisenbach case backed up by Fredendall v. Abraham & Strauss, let us take a look at the state of the law on the subject of implied warranty as applied to the sale of food-stuffs. Personal Property Law, Art, 5 §96 provides in substance that there is no implied warranty or condition as to quality or fitness for any particular purpose of goods sold, except among cases where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller's skill or judgment. The case of Rinaldi v. Mohican Co., 225 N.Y.70, held that the mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required, and that there is an implied warranty of fitness for human consumption. In Race v. Krum, 222 N.Y. 410, the rule also was set down that accompanying all sales by a retail dealer of articles of food for immediate use, there is an implied warranty that the same is fit for human consumption. This rule arose due to the high regard which the law has for human life. The logic of the rule is that the vendor has an opportunity which the purchaser does not have of determining whether the article is in the proper condition to be immediately consumed.

With these thoughts in mind let us see how this works as regards trichinosis cases. The disease called trichinosis most usually is contracted by the eating of the flesh of pigs infected with the worms, the worms propogate in the human intestine and finally reach the human muscles through the bloodstream. The worms are scientifically known as trichinella spiralis and are infinitesimal in size ranging from one and one-half to five and one-half mil-

limeters in length. It is generally admitted and the experts on the Eisenbach trial, Dr. John Pardee, Dr. Armin V. St. George, and others, stated that the disease might be found in the best hog ever raised and that you couldn't tell by looking at the hog whether it was infected. It would seem therefore extremely harsh to hold the packer or any vendor liable unless there is something he can do to destroy the worm prior to the putting of the meat on the market. It is conceded that there is but one way actually to detect the presence of the worms in the meat and that this is by a microscopic examination. This has, however, proven unsatisfactory in that, to be certain of its absence every portion of the meat must be examined - and to do this would require its dissection to such an extent as to destroy its use as food, to say nothing of the impracticability of such a routine. The mere examination of one portion of a carcass is no test as to whether some other portion is also free from the trichinae. As further evidence of the failure of such an examination the governments of both the United States and Germany,-where the disease is far more widespread than here- have discontinued such an inspection.

Hence as there is no practicable means of detecting its presence the next best step is to render the meat wholesome in spite of the trichinae. This can be done by either one of two methods: extreme heat or extreme cold. As is the case with other germs, ordinary cold is of no effect, so in order to kill the trichinae by cold it has been found necessary to subject the meat to a temperature of five degrees Fahrenheit for a period of twenty days. Treating pork so, destroys its quality as fresh pork and it may then be sold only as frozen meat. Such frozen pork loses much of its palatability in the thawing process. The Government requirements do not insist upon the freezing of fresh pork though this is required as to process meats such as bologna which are to be consumed without further cooking. Also it must not be overlooked that the public demand that its pork be exactly that. We come then to the other preventive; heat. Trichinae are destroyed if subjected to a temperature of 137 degrees Fahrenheit. However, it goes without saying that this cooking process is entirely out of the hands of the packer or any other vendor.

In view of these facts which were brought out in the testimony presented in the Eisenbach case and are admitted by practically all authorities, it would seem that the vendor finds himself upon the horns of a dilemma. He can't sell fresh pork and yet be sure of avoiding suit due to the breaching of a warranty through no possible fault of his own. It is therefore my belief that he should not be held for any breach of implied warranty predicated on the existence of trichinae in any fresh pork he may sell. Judge Lehman in a scholarly dissent in the case of McSpedon v. Kunz (supra), said, "that the implied warranty of the packer that pork is merchantable and therefore fit for human consumption, is not breached by sale of pork prepared in the usual manner approved in the industry, salable in the usual way and not unfit for human consumption if used in the manner in which the packer might reasonably expect it to be used and for which it was intended."

The seller is merely charged with the sale of goods of merchantable quality or he impliedly warrants that the meat is fit for hu-

man consumption (they mean the same thing, substantially). Now fresh pork is sold to be eaten only after it has been cooked...the meat therefore is rendered unwholesome due to the failure to cook it properly. For this reason I think this warranty should be as was given in Holt v. Mann, 200 N.E.403, that the food was fit after ordinary domestic cooking.

Now in the McSpedon case only the packer appealed and the majority of the court held him liable on the strength of the purchaser a housewife's testimony that she knew nothing about the requisite heat or about trichinae. She did admit, however, that she knew pork should be well cooked but this the majority did not believe to be sufficient. The majority also put what I believe to be undue weight upon the freezing and the microscopic examination. Judge Lehman in his dissent in which Judges O'Brien and Crouch concurred, placed his dissent on the fact that there was no satisfactory finding that the pork was cooked as thoroughly as could be expected and that without such a finding there is no basis for a conclusion that there was a breach of implied warranty by the appealing packer He advanced the view that the seller's warranty does not extend to the wholesomeness of raw pork when the pork is not ordinarily intended to be eaten raw. He stated that the warranty should be applied only to food used in the usual, and not in the unusual or improper manner and cited the case of Cheli v. Cudahy Bros Co., 267 Mich. 690, where the court set down this principle.

Looking at the whole situation then we find that in McSpedon v. Kunz, a recovery is allowed on the woman's statement that she didn't know about trichinae but she did know pork should be well cooked, whereas no recovery was allowed in the Eisenbach case where the chef did know about trichinae. It is interesting to note that in the Eisenbach case the court failed to mention either the freezing or the microscopic tests. So now in all cases where trichinosis has been contracted due to the eating of fresh pork the question at issue boils down to whether the buyer (if a restaurant is in the case he is the buyer though he feeds patrons - remaining liable in any event for failure properly to cook) knew or did not know about trichinosis. Judge Crane in the McSpedon opinion stated in substance that a poor housewife such as the plaintiff could not be expected to know of the dangers of improper cooking. It is my opinion that though it is true that the ordinary person does not know of the trichinae germ as such or by that name, he does have knowledge that pork, to be safe, should be well cooked. Trichinosis was not "discovered" until the year of 1822, yet one entire religious sect were sufficiently aware of the danger of eating pork to prohibit by religious edict the eating of pork in any form. The danger of poorly cooked pork is a matter of common knowledge and I believe the court should recognize this fact. If the plaintiff in the Fredendall case was declared to have failed to exercise due care in failing to read and to follow the directions on the can, I believe that a housewife is equally at fault in not having knowledge of such facts regarding the cooking of pork. And that therefore in any case involving the breach of a warranty in the sale of fresh pork alleged to have contained trichinae the lack of due care on the part of the housewife should bar a recovery against her vendor, on the same theory that prevented Gimbel Bros. from having an action over against their wholesaler.

From all this it is my contention that aside from an action by a guest of a restaurant versus the restaurant alone, no action for breach of implied warranty should be predicated on the sale of fresh pork which is found to have been infected by trichinae, as in every other such case the exercise of proper methods of preparation would prevent the resulting injury.

WARREN MATTICE ANDERSON

THE MOTION PICTURE IN THE COURT ROOM

Along with the development of motion pictures has arisen the problem of their use in our court rooms as a method of presenting evidence. As early as 1923 the question arose in a New York case, Gibson v. Gunn, 206 A.D.464. There the plaintiff was suing for damages arising from personal injuries incurred in an automobile accident. The plaintiff had been a vaudeville dancer and performer who previous to this incident had lost his left foot. The vaudeville act opened with a moving picture in which the plaintiff was shown walking down the street using crutches. He is shown stopping in front of a shop looking at the artificial limbs there displayed. In the next scene he encounters some fellow dancers. Thereafter all the friends execute various dance steps, each of which is imitated in turn by the plaintiff. As the piece de resistance the plaintiff undertakes a series of terpsichorean manouvers so complex that the healthy friends are forced to retire.

The Appellate Division there said that "Aside from the fact that moving pictures present a fertile field for exaggeration of any emotion or action and the absence of evidence as to how this particular motion picture was prepared, we think that the picture admitted in evidence brought before the jury irrelevant matter, hearsay and incompetent evidence, and tended to make a farce of the trial." (Id. p.465). It can readily be seen that this decision is no signpost as to the direction which the courts later take.

The Pensylvania case of Commonwealth v. Roller, 100 Pa.Super.Ct. 125, decided in 1930, provides a splendid example of the use to which the modern moving picture may be put. In that case the defendant was being tried for larceny. The prosecutor had the foresight to record the confession made by use of a talking picture machine. The trial court admitted the evidence on the same ground as still photographs. It was pointed out that the ways of introducing evidence increase with modern development. The dictograph, the x-ray, finger-prints, and others were pointed out as examples.

Following cases where motion pictures were held not admissible in evidence at all, came a series of cases holding that their production was in the discretion of the presiding judge, and that to deny their admission was not error. Thus, in State of Maryland for Use of Chima v. United Railways & Elec.Co., 162 Md. 404, the court held that the introduction in evidence of moving pictures was in the discretion of the trial judge. That was an action for wrongful death of an infant, alleged due to the negligence of the defendant company, on whose trolley car the infant was a passenger. Plaintiff's counsel desired to show the sway of the car at the point of the accident. The pictures were of a different car and taken at a time subsequent to the accident. They were not allowed to be shown and upon appeal the Maryland Court of Appeals stated that the sway of the car as it might appear on the screen would be subject to the camerman's manipulations and that he could make a movement appear faster or slower as he desired. Nothing was said on the point that such contingencies might be provided for. The decision of the trial judge was held final.

In 1934, the first Department decision of Boyarsky v. Zimmerman Corp., 240 A.D.361, put forth very forcefully the holding that such method of presenting evidence was entirely proper and that a refusal to allow it in a proper case is error. In that case the defendant offered motion pictures to disprove the plaintiff's testimony as to his physical condition resulting from injuries alleged due to the defendant's negligence. These pictures were taken eleven months after the accident without the knowledge of the plaintiff and showed his movements to be contrary to testimony given by him. There was in the case a sharp issue of fact involving the physical condition of the plaintiff. The language of the court will bear repetition here: "It may be that there are many cases where moving pictures should not be allowed in evidence. In no case should they be admitted unless a proper foundation has been laid therefor. In most cases the question sould be left largely to the discretion of the trial judge. If a trial is to be unduly delayed by exhibiting moving pictures, the court may very properly refuse to permit such a delay. If moving pictures are sensational only, and unnecessary, the court should refuse to permit such evidence, particularly where the facts may be described or the evidence submitted in another form, and thus avoid the delay and difficulty which will result from their introduction.

"The well-known progress being made in the moving picture world has resulted in great accuracy in depicting the true conditions sought to be shown. The mechanical means of perfecting such pictures has become so general that it may be necessary in the near future to frequently permit their introduction in evidence. In many cases the pictures may not only have a bearing on the facts, but may be absolutely decisive of the issues involved in the action." (Id. pp. 364-365).

What is a "proper foundation" for the admission of such pictures? In Pacific Mutual Life Insurance Co. v. Marks (1935), 161 So. 543, an Alabama court held that pictures of the plaintiff who alleged he suffered from arthritis could not be allowed in evidence as there was no testimony as to the speed at which the pictures were taken. The Supreme Court of Rhode Island in Owen v. Haggenbeck-Wallace Shows Co., 112 A.L.R. 113, also set forth that such evidence is admissible, but that the pictures must be authenticated. The court said that if it ever should become necessary and proper that a moving picture should be viewed by a jury, the trial judge should require proof that the picture was a true reproduction of the scene photographed and adequately authenticated according to the rules of evidence. It was further pointed out that if this were not done a false picture might be presented by cutting or other devices.

In a California case, Herman v. Market Street Railway, 69 Pac(2) 178, decided in 1937, where a question whether the plaintiff suffered certain injuries arose, the plaintiff contended that in no instance should moving pictures be allowed in evidence. His contention was based on the ground that motion pictures can be faked to show other than the truth. The court refused to uphold such an argument stating that all evidence is subject to distortion. Since, however, the films were shown to be a true representation of the scene as witnessed by the photographer the objection was held to be without foundation. Since still photographs are permissible, reasoned the court, why should not a series of such, as is a moving

picture, likewise be admitted? Boyarsky v. Zimmerman Corp., supra, is cited with approval therein.

In no one case are the rules of admission of moving pictures in evidence specifically outlined. The terms used by the courts are vague and do not go into detail. Among the cases a Florida decision Gulf Life Insurance Co. v. Stossel, 179 So. 163, is the least general in setting forth admission requirements. In order "to be competent evidence, the film must be properly authenticated and shown to be a faithful representation of the subject, sound, movement or other tangible or intangible thing which they purport to produce. When such a showing is made to the trial court, moving picture films should be admitted under the same rules as photographs."

Professor Wigmore in his 1934 supplement of Wigmore on Evidence (second edition) on pages 341-342, suggests some of the factors which he considers necessary to lay a proper foundation for the admission of moving pictures. The outline set forth there is detailed It is suggested that along with proof of the competence of the operator, the evidence as to the camera and the film, the exposure, the developing and the projector and screen be given.

Such great detail would probably not be required in our New York courts. In the admission of still photographs, the photographer is no longer required to be a witness. However, it would seem that such person should be present to testify to the speed of the camera and to the fact that he took the pictures. This testimony, along with the actual testimony, that the film is a fair representation of the scene and events shown should suffice. Evidence as to the lens used, the weather conditions, the type of film and other similar details probably would not be necessary. The motion picture camera is no longer an intricate piece of machinery requiring an expert to operate it. On the other hand, it is substantially as simple to use as is the camera for taking still pictures. That motion pictures may be used as a means of presenting evidence in our court room is no longer denied. While the rules governing their admission are not specifically set forth yet, it is felt that in a proper case the court will not refuse to receive them when properly authenticated.

ARTHUR ANSTY DARRIGRAND

N O T E S

ARE MUNICIPAL CORPORATIONS UNDER §289 OF C.P.A.?- The layman is often of the opinion that it is the purpose and result of the law, and particularly of procedural provisions, to sterilize the already blindfolded Justice. Lawyers and judges are regarded as high priests skilled in mumbo-jumbo threading the devious and labyrinthine ways of a musty and rigorous formalism in feeble but vain efforts to attain the bright light of well-adminkstered justice. However, the tendency in recent years has been toward liberalization, especially of the rules of practice, both by statutory change and judicial construction. In view of this trend those sections of the Civil Practice Act (Art.29) which provide for the taking of testimony by deposition, have been generally interpreted liberally.

Nevertheless, formidable authority has confined the application of §289 C.P.A., which provides for the taking of testimony by deposition when the adverse party is a corporation, to private corporations as distinguished from public corporations. Davidson v. City of New York, 221 N.Y.487, and Bush Terminal Co. v. City of New York, 259 N.Y.509, have established the ruling that this section does not apply to municipal corporations.

The early case of Uvalde Asphalt Paving Co. v. City of New York, 149 A.D.491, while not deciding this point, stated "It would seem, therefore, that there is much force in the contention that the provisions of subdivision 7 of said §872 (now §289 C.P.A.) be construed as not applying to municipal corporations."

The rule has been followed in Smith v. Citizens Savings Bank, 166 Misc.843; Lovero v. Home Owners' Loan Corp., 172 Misc. 754; Rucker v. Bd. of Education of City of New York, 172 Misc.731; Boulton v. La Guardia, 166 Misc. 293; Greenberg v. City of New York, 235 A.D.788; Pardee v. Mutual Benefit Life Ins.Co., 238 A.D.294; Cooper v. Village of Brockport, 246 A.D.571 (4th Dept.); Matter of Ihrig v. Williams, 181 Misc.864. The reason for the exemption was stated in the last case: "to relieve municipalities from annoyance incident to such examinations and the loss of time of their officers and employers that would be caused thereby." Uvalde Asphalt Paving Co. v. City N.Y., supra, also noted that municipal officers would seldom have any personal knowledge, and provision for obtaining books and records was elsewhere provided, particularly in 1545 of the Charter of the City of New York.

Applications to examine employees and agents of the State who might have knowledge concerning the cause of action and the manner in which the claimant received the injuries sued upon have been denied. (Friedman v. State of New York, 161 Misc. 358; Langdon v. State of New York, 160 Misc. 946.)

This last situation has been taken care of by Subd. 2 of §17 of the Cort of Claims Act (Laws of 1939, Chap.860) providing: "Upon application of the claimant after notice to the Attorney-General and upon proof that the examination of an officer or employee of the State or of a witness is material and so necessary that he cannot properly prepare for trial or present his claim to the court

upon the trial, and that the interests of justice require the same, the court may, in its discretion, order the examination before trial of such officer or employee of the State as an adverse party, or of such witness, to be held before one of the judges or as in §301 of the C.P.A. provided. The court may grant such application upon such conditions as it deems proper."

Returning to the question of municipal corporations, the case of Rosen v. Central Hanover Bank & Trust Co., et al., 246 A.D.624, in its order denied the motion of defendants, appellant, to vacate notice of examination of the Mayor and Treasurer of City of Long Beach, stating: "As they are not subject to personal liability under the allegations of the complaint, they cannot be examined before trial, notwithstanding that judgment is not asked against the city."

Contrary to the general rule is McCutcheon v. Board of Education City of White Plains, 242 A.D.659 (2d Dept) holding: "We are of opinion that the teacher whose testimony is to be taken is, in the circumstances disclosed, a person within the scope of §289 of C.P.A.

The case of the City of New York v. Velmachos, 129 Misc.177, has this to say, in considering Davidson v. City of N.Y., supra, and its basis, Uvalde Asphalt Paving Co. v. City of N.Y., supra, "On the other hand, the effect of the decisions may not be so sweeping as to deprive a party absolutely from all examination of the adverse party before trial, where the latter is a municipal corporation. They must be construed in the light of the reasons which actuated the court. Where a party has exhausted all the liberal provisions for discovery allowed him under §1545 of the charter, and is still short of the information which he is ordinarily entitled to obtain on an examination before trial, it may well be that he should be extended that privilege, on a showing that he has exhausted his other sources. It would follow from such a rule that the simple examination on notice under §289 of the Civil Practice Act is inappropriate, and perhaps in a proper case an order would be requisite upon a presentation of facts indicating that the party seeking the examination has taken advantage of the available sources of discovery under the charter, and still lacks the necessary facts to establish his cause of action, to obtain which an examination of the adverse party is essential. The present application affects a mere notice of taking testimoney which must be vacated, with leave to the defendants, should they be so advised, to apply for an order upon appropriate showing in accordance with this opinion."

Bills are now pending in the Legislature to amend §289 C.P.A. specifically to include municipal corporations. (Senate Introductory No. 285, Assembly Introductory No. 326). The cases of Kasitch v. City of Albany, and Czyzewski v. City of Albany, now pending in the Appellate Division involve the same question herein discussed. The plaintiffs in these pending cases rely upon the case of Weinberg v. City of Troy, 256 A.D.1028 (3rd Dept) in which the examination of defendant was allowed, two judges dissenting on the authority of the Davidson and the Bush cases cited, supra. This case

seems to be against the weight of authority. In view of the long line of authorities given, the defendant appellant should succeed in vacating notice of examination before trial. But imminent legislation seems destined soon to change the rule.

J.E.B. (assisted by Shannon, '40)

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STRICT INTERPRETATION OF INFERIOR COURT JURISDICTION.- Thoroughly in keeping with the present vogue in the international sphere is the relatively obscure legal question of the jurisdiction of the Municipal Court where service has been made, pursuant to statute, on the Secretary of State, outside of the municipality. Various "Miscellaneous" decisions have fired salvoes at one another from positions on opposite sides of the question. The case of McCulloch v. American Carrier Corp.,172 Misc.450, now enters the fray. It allies itself with Tannenbaum v. Wehrle, 133 Misc. 577; Osterhoudt v. Horowitz, 135 Misc. 755, Heihs v. Reinberg, 136 Misc.815, and opposes Bessan v. Public Service Co-Ordinated Transport, 135 Misc. 368, and Marcus v. Day, 139 Misc.283. All these cases arise under §52 of the Vehicle & Traffic Law, and its predecessor, §285-a of the Highway Law.

The McCulloch case decided that the Municipal Court of New York had no jurisdiction to enter a judgment against a foreign corporation which had been authorized to do business in this State and had appointed the Secretary of State its agent for the service of process. Service had been made on such agent in Albany, and hence outside the territorial jurisdiction of the Municipal Court of New York, which is limited to New York City (§14 Municipal Court Cod). The jurisdiction of local courts has been limited by the constitutional restrictions on legislative enactment. (Art.VI §§18, 11). Section 52 of the Vehicle & Traffic Law is involved only by comparison, but this statute and §217 of the General Corporation Law both directly raise the effect of legislative enactment on the territorial jurisdiction of municipal courts. But the difficulties arising under §52 of the V.& T. Law have been to some extent resolved by the case of Gruber v. Wilson, 276 N.Y.135.

This case presumably overruled the dissenting cases of Bessan v. Public Service, and Marcus v. Day, supra, by holding that it was not the legislative intent to enlarge the territorial jurisdiction of local courts by §52 of the V.& T.Law. The Bessan and Marcus cases held that service, pursuant to §52 of the V.& T.Law, on the Secretary of State outside the territorial limits of the Municipal Court gave the court jurisdiction. However, the case expressly left open the effect of Chapter 490 of the Laws of 1937, amending §52 to give a summons served under the section "the same legal force and validity as if served on him personally within the State, because this statute was not in effect at the time the facts of the case transpired, and was not retroactive. The constitutionality of the legislative enlargement of local jurisdiction was likewise not considered. (pp.138, 140).

Gruber v. Wilson, supra, though not in point, as it concerns §52 V.& T.Law, still adds weight to the reasoning of McCulloch v. American Carrier Corp., wherein §217 Gen. Corp. Law is involved. From these cases it is apparent that statutory enactments will be rigidly confined lest they transgress the constitutional boundary of inferior court jurisdiction.

J.E.B.

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CONVICTION OF PREVIOUS OFFENSE BY COURT-MARTIAL.- The determination of a prisoner's status as a first or second offender is one of vital importance both to the court imposing sentence and to the defendant because of the substantially increased severity of punishment in cases of second offenders. The case of Pro. ex rel Stewart v. Wilson, 13 Supp.(2d) 749, is, apparently, the first authoritative pronouncement on an interesting phase of this question. The appellant Stewart, as attorney in person, contended he was improperly sentenced as a second offender upon conviction, after a plea of guilty, of the crime of attempting to commit burglary in the third degree. He contended that a previous conviction in a court-martial of the U. S. Army for the crime of sodomy was not such a previous conviction as was intended by §1941 Penal Law which directs additional punishment for persons previously convicted within the State of a felony, "or under the laws of any other state government or county of a crime which, if committed within this state, would be a felony." The appellant cited the absence in such court of indictment, officials skilled in the law, and usual opportunities for appeal. The court, however, denied the appellant's petition declaring the differences in procedure immaterial since here the military court was a court of competent jurisdiction established by the Federal Government, and the conviction was for a crime which if committed within this State would be a felony. An application for an appeal from this determination of the Appellate Division, Third Department, was denied by the Court of Appeals.

There are many cases of prisoners who have been previously convicted of felonies by court-martial, particularly for offenses committed in France during the period of the last World War. Before this decision of the Appellate Division it was by no means a commonly accepted notion that these convictions came within the provisions of §1941 of the Penal Law.

J. E. B.

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ARE ATTORNEYS' FEES "EXPENSES" UNDER P.P.L.§78?- The opinion recently handed down in the case of Triple Cities Construction Corp. v. Byers Machine Co., 15 Supp (2d) 89, though no doubt equitable under the facts there presented, seems to give what I believe to be a false interpretation of Personal Property Law §78. The decision is of particular interest solely because the sense in which

the statute comes in question has apparently never before been decided. The question presented is whether in redeeming a chattel after a default in payment under a conditional sales contract, the buyer is required to pay counsel fees under the clause of P.P.L.§78 which reads that the buyer, to redeem, must pay or tender the balance due on the contract and "the expenses of retaking, keeping and storage."

The facts of the case are simple. The defendant sold the plaintiff a steam shovel under a contract of conditional sale and later retook possession for default in payment. Attempting to redeem, plaintiff tendered the balance due, and expenses of retaking and storage. One item of expense claimed was attorney's fees to which plaintiff made objection. Having need of the property immediately, however, it paid under protest and now seeks to recover the sum paid. There was a clause in the contract to the effect that in an event such as did occur here, "the buyer agrees to pay all costs, charges and expenses the seller may be put to, or incur by reason of the default of the buyer, including reasonable attorney's fees."

This clause is of no effect whether such fees are collectible under P.P.L.§78 or not. If proper, it but reaffirms. If not within the expenses intended by the Legislature, it is rendered a nullity by Personal Property Law §81-f, which recites that "no act or agreement of the buyer before or at the time of making of the contract****shall constitute a valid waiver of the provisions of Personal Property Law seventy-eight****."

So the case turns entirely on the construction of the word "expenses" in P.P.L.§78. Are attorney's fees a proper element of such expenses? This case holds that they are never proper. In so concluding the court correctly sought to ascertain the legislative intent as the controlling factor. It is in their determination regarding this intent that I take issue. Their reasoning is based on the question whether the Legislature may fairly be said to have anticipated that proceedings of a legal nature requiring services of an attorney would be necessary. And in support of the conclusion that it could not have been so anticipated, they state that the property may be taken without legal process and without the aid of an attorney. This admits of no doubt, but in such a case, no expense of a legal nature would nor could be shown nor collected. They further say that even though the replevin be necessary, attorneys' fees are not a proper element of expense in replevin actions. This correctly states the rule. But we are not faced here with a question of damages recoverable in a bill of costs, but rather with a statute giving a special right of a vendor to collect expenses, after - not in - a replevin suit, a condition precedent to the buyer's redemption. Hence I fail to see how this rule of damages could possibly have been said to show that the Legislature intended that the attorney fees be not included in expenses under P.P.L.§78.

The purpose of the statute is clearly to give a defaulting vendee an opportunity to regain his chattel and to make it possible for the parties to continue the contract as if nothing had disturbed its continuity. In other words, to put the parties back in the same position they were in prior to the default. That this was its pur-

pose is illustrated in the case of Harlee v. Federal Finance Co. (Del.), 152 Atl.596. In that case the issue revolved about an acceleration clause but in commenting on the statute as a whole (the statute having the same wording as our P.P.L.§78) the court said "There would be no hardship on the seller if after a short delay of only a few days the default be removed without expense to him and buyer be allowed to proceed with the contract the same as if there had been no default." How can it be said that it is without expense to him, if the seller be compelled to stand the expense of attorneys' fees to regain his chattel, after the buyer has defaulted in failing to fulfil his contract obligations? Such expenses are only brought on when the buyer sets up unwarranted resistance in failing to turn over the chattel on demand. It is my belief that any legal fees which the seller was obliged to incur in retaking were as much a type of expense intended by the Legislature as are sheriff's fees.

There is one case which appears to point the way to such a construction - that of Goldberg v. Wisner Mfg. Co., 170 Supp.551, and though not controlling on its facts, it does present an analogous situation. There in an action pursuant to the provisions of P.P.L.§80-e to recover payments made under a conditional sales contract on the ground that the seller had, after replevying the chattel, failed to sell them within sixty days as provided by statute, the seller was allowed to counterclaim expenses of replevy, including attorneys' fees. The court there said in substance, that when the buyer puts the seller to extra expense in obtaining the goods such expenses are chargeable against a claim asserted by the buyer. In this case the statute gave the buyer a right to recover payments made after a default, in our case the statute gave the buyer the right to pay up and continue under the contract as if there had been no default. If counsel fees be proper in the former case, why not in the latter?

It goes without saying that conditional buyers are in need of protection from unscrupulous sellers. To this end statutes have been enacted so as to equalize their contracting power and insure fair dealing. Our courts should and have recognized this problem and have interpreted these statutes in accordance with their spirit, but in so doing the plain words of the statute should not be ignored. If an interpretation such as I have herein advocated will open the door to attorneys' fees where they are unnecessary, it might well be provided that before resorting to any legal service whatsoever which might add to the expenses of redemption, the seller be required personally to make a demand that the chattel be returned after the buyer has defaulted. If this be the practice the buyer could only be confronted with attorneys' fees as a condition precedent to redemption after his own resistance has made them necessary.

W. M. A.

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PARNESS v. HALPERN, 257 A.D. 678,- The plaintiff was injured while riding in a car driven by her husband. The car was owned by the defendant. The plaintiff in this action alleges two specifications of negligence: first, negligent operation; and second, operation

knowing the car to be defective. It appears that the car was being driven by the husband in behalf of Halpern, the owner. The plaintiff moved under C.P.A.§193 subd.2 to bring the plaintiff's husband in as a party defendant. The motion was denied and this court affirmed the order denying the motion.

The basis for the decision and the case that the court cites as its authority is Nichols v. Clark, 261 N.Y.118. The proposition which the court had before it in that case was somewhat different. However, it did involve the question of a complaint in which more than one specification of negligence was made. In general, in that case the plaintiff in his complaint alleged that the defendant, consulting engineers employed by him in the construction of his house, wrongfully represented that "Celotex" was suitable for use in covering hot-air pipes whereas in fact it was inflammable; and also that there was further negligence in that the entire heating plant was so designed as to be unsafe and highly dangerous in the normal use thereof whereby the house caught fire. The defendant in that case moved under the same section (C.P.A.193) to bring in the Celotex Company. The motion was denied, the court saying "the Celotex Company would not be liable over to these defendants for any part of a judgment recovered by the plaintiff, as, under the allegations in the complaint, the judgment could be, or might be, based entirely or in part upon the sole negligence of the engineers, having nothing to do with Celotex."

In both cases there is on one specification of negligence, a basis for recovery over against the third party. But in each case there is also the other specification unrelated to the third party. It is certainly appealing and logically defensible that the third party should not be made a party to the action when the judgment rendered may not represent his liability. We cannot argue with this. It is unfortunate, however, that the courts start with the premise that there can be but one verdict in the action. Special verdicts are not a new thing in our court procedure. It is provided in the Civil Practice Act, §458, that, "in any action**** the court may direct the jury to find either a general verdict or a special verdict upon all or any of the issues."

It would seem that the instant situation would be an excellent field for the use of this section. It was not urged, apparently, in the Parness case. The court merely applied the rule as it found it in the Nichols case. It should benoticed, however, that at the time the Nichols case was decided (1933), the court could not have directed a special verdict in an action to recover a sum of money only. In any future action in which this precise point appears again, should the use of the special verdict be urged, the language in the Nichols case should be considered in relation to the then reading of C.P.A.§458.

In viewing the probability that the use of the special verdict might be accepted in this situation, we should take some cognizance of the almost proverbial strict construction of this §193 subd.2 relating to joinder of third parties on defendant's motion. Perhaps the key to the attitude of the court is best voiced in these words:

"It is true that under §193 subd.2 of the Civil Practice Act

> parties may be brought in in actions at law at the instance of a defendant where there is a liability over, either through indemnity or contribution or otherwise. That such liability may exist should clearly appear; and even when there is a wide discretion given the court to which the motion is addressed in protecting the rights of the plaintiff to whom is given primarily the choice of parties. It is not enough to consult the convenience of the defendants alone.****where it appears that the administration of litigated business may be promoted without too great a sacrifice of the plaintiff's rights, the parties will be brought in on defendant's motion." (Greenhouse v. Rochester Taxi Co., 218 A.D.224).

It is in the interest of the plaintiff and to the end that his case should not be prejudiced that a narrow construction has been given this section. As a matter of fact, in the Nichols case itself it was the interests of the plaintiff that finally determined the case. The court said there,

> "The representations made by the defendants to the plaintiffs are not the same as those made by the Celotex Company to them. ****The cause of action must be the same or at least based upon the same ground, although arising, of course, out of different relationships." (Nichols v. Clark, supra).

The whole effort of the court has been applied toward limiting this "bringing in" to a situation where the third party is liable on exactly the same facts so that the addition of the third party will inject no new issues. All the cases which follow the Nichols case, cite it upon the latter point, and not the point involved in the Parness case. (Gilbert v. Mehrtens, 159 Misc. 702; Blizard v. Binghamton Gas Works, 157 Misc. 97; James Trading Corp. v. Dixson, 239 A.D.762).

I emphasize this point because the use of the special verdict involves no hardship to the plaintiff. Given a situation in which one of the specifications of negligence presents a case within the decisions there seems to be no judicial policy in relation to §193 which can possibly be interfered with.

The Parness case also raises indirectly the much debated question of contribution among joint tortfeasors. It was not alleged there that the husband, the driver of the car, knew of the defect in the car. The court, however, indicates that even were the allegations in the complaint it could effect no different result. The husband and the owner would then as to that allegation be joint tortfeasors and there would be no right to contribution. (C.P.A. §211-a; Fox v. New York Motor Lines, 257 N.Y.305). This would have to be so under the existing rule. It should be pointed out, however, that the rule as to contribution is quite likely to be enlarged in the near future. The Law Revision Commission has made an exhaustive study which appears in the 1939 Report. The recommended course is not an amendment of the present rules, but the enactment of an entirely new section. It is now felt that the subject of joint tortfeasors and contribution should have unified treatment as a separate problem.

B.F.B.

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"PEOPLE ON COMPLAINT OF ROSSITER v. ROSSITER."- The defendant in this case was charged with violation of §1290 of the Penal Law of the State of New York. The specific crime charged was larceny by embezzlement. The complainant was the wife of the defendant. At the conclusion of her direct testimony he moved to dismiss the charges on the ground that, being the husband of the complainant, he cannot, as a matter of law, be guilty of the crime of larceny or embezzlement of her funds. In an opinion reported in 17 Supp.(2d) 30, Magistrate Bromberger of New York City denied the motion.

This was not a simple matter to decide. The question has not arisen with great frequency in the courts of this State. Whenever it has, the courts have divided on the solution. So, too, have the courts in other jurisdictions. Numerically, it would appear that the weight of authority is against the decision of Magistrate Bromberger. Let us then consider the opinion in the Rossiter case. In doing so we shall also study a decision handed down by Justice Schenck in Peo. ex rel. Troare v. McClelland, 146 Misc. 545, in which he held that a wife may not, as a matter of law, be guilty of the larceny of her husband's property. While the court was there concerned with the liability of a wife for larceny of her husband's property, it is clear that the opinion of the Court permits of no reasonable argument that it might have held otherwise had the defendant been the husband rather than the wife.

At common law, owing to the unity of husband and wife and the rights of the husband in the property of the wife, the wife cannot commit felony of the goods of her husband. Her protection was the unity of the social relationship of marriage. If this common law rule has not been abrogated by statute it is binding upon the courts of this State.

It is clear that the unity as created by common law does not exist "in toto" today. Legislation has pierced it and no longer do the spouses become as one by virtue of the wedding ceremony. A married woman has been given the right to hold property in her own name She may contract independently of and even with her husband. No longer is the husband liable for the torts of his wife unless they were done by his actual coercion or instigation.

The question then is: has this break from the common-law "oneness" been total, or only partial? Are the husband and wife to be considered as separate and distinct individuals for all, or only for some purposes? Or, more particularly, has the unity been so shattered as to permit one spouse to be guilty of larceny of the goods of the other?

In the Troare case it was held that no statute has changed the common-law rule. It was said there that the unity has been destroyed only insofar as, and for those purposes only, as the specific statutes state. This is supported by the rule that statutes in derogation of the common law must be strictly construed. As Justice Schenck said in answering the argument that the words "a person" in the statute defining larceny apply to a wife or a husband as well as to any other person, "the penal statutes of this State must be strictly construed and if the Legislature intended that one spouse

could charge the other with such crime, it should have used such language as to have left no room for doubt." This is the strict legal viewpoint.

Coming now to the Rossiter case we find the view expressed that although the Legislature did not specifically express it, it was intended by the enactment of the Married Women's Act. "*****the Legislature patently intended a complete emancipation of married women in their property rights and holdings by its enactments to that effect. These acts must be held accompanied by the correlative and necessary power fully to protect, safeguard, enforce and defend those property rights.*****To deny a spouse the right to prosecute the other for a crime against the property rights thus assured, would be tantamount to imposing and judicially enacting a limitation never intended by the legislative body. Had such restrictive result been contemplated as against any person, it is fair to assume the Legislature would have expressly so provided in the various so-called emancipatory acts."

Thus we have the problem: strict construction, or, as I see it, the logical consequences of the legislative acts. There has been a disruption of the common-law doctrine of "unity by merger of marriage" by statute, to the extent that the parties to the marital bonds now stand independently of each other in their individual holdings.

My version is that the decision in People v. Rossiter should prevail. Admitting that the common-law unity must have consisted of more than the ownership of the wife's property by the husband, and that more fundamental was the principle of unity of social relationship, yet, if one spouse may hold independently of each other, then, as expressed by Magistrate Bromberger, "as a logical consequence they stand independently of each other, in the enforcement, protection and defense of their holdings, even as against each other." (People on Complaint of Rossiter v. Rossiter).

There is no longer any reason for preserving this unity of social relationship strong enough to overpower the logic of the Rossiter case. The reasons for the common law principle have long been dead. Women have attained, if they didn't always possess it, a parity with men, on enough fronts for us to say that they are capable of handling their own affairs. Social revisions and legislative modifications have so altered the common-law conception of marital status that the fiction there created has become transparent.

The substance of the fiction of unity is that the two spouses merged. By legislation, that unity has been disrupted by giving to the two, separate and independent rights. By giving them the rights, it seems to me you fasten upon each, perforce, the duty to to respect those rights as possessed by the other. If a breach of that duty constitutes a crime then the protection of society and the social interest served by refusing to permit a criminal offender wholly to avoid the prescribed penal sanctions, demand that the violator be punished.

H. E. K.

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EXTRADITION.- The New York law affecting the rendition of fugitives from justice to the state in which the crime has been committed is based upon the United States Constitution, Art.IV §2 Subd.2 and is set forth in the Code of Criminal Procedure Title IV Chap.1 §§827-851. In 1936 the Legislature repealed the sections relating to this subject but immediately re-enacted substantially the same provisions, and the New York law is now in conformity with the Uniform Criminal Extradition Act.

The usual procedure in such cases is the issuance of a warrant by the Governor of New York upon the requisition of the governor of the state of the crime. Upon such requisition in the form prescribed by §830 C.Cr.P., it is the duty of the Governor of this State to have the fugitive arrested and delivered up to the executive authority of the demanding state. This duty, ministerial in its nature, must be performed and the governor upon whom demand is made may not exercise any discretionary power. But Chief Justice Taney, in Kentucky v. Dennison, 20 How.66, writes, "The words 'it shall be the duty' imply the assertion of the power to command and coerce obedience. But looking to the subject matter of the law and the relations which the United States and the several states bear to each other the court is of the opinion the words were not used as mandatory and compulsory but as declaratory of the moral duty which the compact created.****If the governor refuses to discharge this duty there is no power****to use any coercive means to compel him."

But if the governor performs his duty, the next step must be taken by the prisoner. He may waive all procedure incidental to extradition proceedings by conforming with §851 C.Cr.P., which merely prescribes the method of waiver. In such case the accused is immediately turned over to the executive authority of the demanding state. Should he, however, elect to resist the extradition, his proper remedy is an application for a writ of habeas corpus. In such proceeding, in order to be successful, he must conclusively establish the fact that he was not within the demanding state when the crime is alleged to have taken place. Inquiry may be made upon such application into the questions as to -(1) whether the papers required by §830 C.Cr.P. and upon which the warrant was issued by the governor are sufficient; (2) sufficiency of the indictment in respect to charging a violation of the law of the demanding state; (3) whether accused was in the demanding state at the time the crime was alleged to have been committed; (5) identity of the accused. No inquiry may be made into the questions as to -(1) sufficiency of the indictment as a pleading; (2) possibilities resulting from the trial; (3) merits of defense; (4) motive and purpose of the extradition proceedings.

The most recent decision of the Court of Appeals upon such an application was made in People ex rel. Higley v. Millspaw, 281 N.Y. 441. There a review of the law is made and the fundamental and essential elements of this phase of the rendition of fugitives are reiterated. There, incidentally, the relator successfully made application for a writ of habeas corpus, sustaining the burden cast upon him by the use of correspondence to show his absence from the demanding state at the alleged time of the crime.

E. P. D.

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LIABILITY OF STATE FOR TORTS OF ITS "OFFICERS AND EMPLOYEES."- A recent case, Goldstein v. State, 281 N.Y.396, presents an amusing example of construction. Goldstein, deceased, had been a member of the State Militia. While riding in a military truck en route to camp, he was killed, due to the negligence of the driver, also a member of the militia.

His representative sued the State under §12-a of the Court of Claims Act. That section constitutes a waiver by the State of immunity from liability for the torts of its officers and employees. In the Court of Claims, Goldstein v. State,168 Misc.337, the plaintiff was refused a remedy because it was held that he was an employee of the State and hence, without an enabling act, was relegated to his exclusive remedy under §3 of the Workmen's Compensation Law (Subd.1, Group 16) or else could obtain a death benefit under §220 et seq of the Military Law.

On appeal the Appellate Division reversed the lower court by holding that since all citizens owe to the State a duty of military service which can be effectuated by compulsion and since "employment" contemplates a contractual relation freely and voluntarily entered into, therefore the plaintiff was not an employee of the State and hence could sue under §12-a of the Court of Claims Act with no disability due to Workmen's Compensation.

The Court of Appeals (281 N.Y.396) recognized the essential error of the Appellate Division. True plaintiff was not an employee of the State. The Court agreed that the essential contractual element was missing. But if plaintiff was not a State employee then his fellow militiaman, the negligent driver of the truck, was not, either. Hence - and this is wherein the Appellate Division erred - the State is not liable under the doctrine of "respondeat superior."

Agency of some sort is necessary to found a claim in tort against some other than the active wrongdoer. Since the State waived immunity from liability for the torts of its officers and employees (§12-a Court of Claims Act), and since the driver was not an officer nor employee (the term officer being included in term employee), there is no liability on the part of the State in the absence of an enabling act. Goldstein, therefore, was relegated to his remedy under the Military Law.

W.A.LeF.

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